



## State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Scott McCallum, Governor  
Darrell Bazzell, Secretary

101 S. Webster St.  
Box 7921  
Madison, Wisconsin 53707-7921  
Telephone 608-266-2621  
FAX 608-267-3579  
TDD 608-267-6897

November 29, 2001

Mr. Robert Springer, Director  
Waste, Pesticides, and Toxics Division  
U.S. Environmental Protection Agency  
77 W. Jackson Blvd.,  
Chicago, IL 60604-3507

Subject: Lender/Representatives Enforcement Discretion Pilot Proposal

Dear Mr. Springer:

For over a year, WDNR and U.S. EPA have been discussing various methods for improving our ability to cleanup and redevelop Brownfield sites where hazardous waste activities have taken place. An option we are very interested in is implementing a pilot project to apply Wisconsin's enforcement discretion to Lenders and Representatives acquiring an interest in property subject to Wisconsin's Hazardous Waste Management requirements through the course of normal business activities, such as lending or foreclosure, who have not acted to cause the conditions at the site which triggered Wisconsin's requirements. Our proposal provides for a case-by-case analysis in order to determine whether our enforcement discretion is appropriate given the site-specific situation. WDNR will use the liability exemption criteria in s. 292.21, Wisconsin Statutes as the basis for determining the appropriateness of issuing an assurance of enforcement discretion with respect to imposing Wisconsin's corrective action requirements.

At a meeting on March 9, 2001 you indicated that we should prepare a letter which provides the specific details on our proposal. You went on to say that the letter needs to identify the criteria we would use in determining whether the use of our enforcement discretion was appropriate and would also need to describe the pilot process and how this type of approach would be implemented.

On April 20, 2001 WDNR submitted a proposal to EPA for review. EPA issued a response letter on June 4, 2001. Several conference calls and a follow-up meeting were held in order to gain a better understanding of EPA's concerns. Based on these discussions, WDNR submitted a revised proposal on October 22, 2001. Additional discussions resulted in the need for further revisions. What follows is background material along with a specific proposal, which supersedes our letters of April 20, 2001 and October 22, 2001.

### Background Information

In the past, many Lenders were reluctant to finance loans for properties or take possession of properties that were contaminated or potentially contaminated because they feared being held responsible for investigation and cleanup costs. In order to encourage the redevelopment of brownfields properties and to alleviate possible liability burdens faced by Lenders, the Wisconsin Legislature created an exemption from the State's Spill Law for Lenders and Representatives.

This exemption was originally created in 1994 by the Land Recycling Law (1993 Wisconsin Act 453), and then amended by the 1997-1999 and 1999-2001 State Budgets. This exemption was intended to provide specific liability relief for Lenders and Representatives in order to encourage them to lend money for the cleanup and development of properties that may have contamination. In Wisconsin, if Lenders or Representatives meet the specific conditions in state law, they will not be held responsible for a pre-existing hazardous substance discharge under the State's Spill Law. The situations where lenders can be released from liability include: normal lending, acquiring property through foreclosure, inspecting property, enforcement of a security interest in personal property and fixtures, and being a representative.

### Federal Exemptions

Certain Federal environmental laws contain exemptions for Lenders. Subtitle I of RCRA contains a security interest exemption that provides secured creditors (i.e. lenders) an explicit statutory exemption from cleanup liability for releases from petroleum UST's. In addition, EPA issued the Lender Liability Rule for Underground Storage Tanks, that describes the specific conditions under which secured Lenders may be exempted from Subtitle I for discharges from petroleum underground tanks.

CERCLA also has a security interest liability exemption, which protects certain Lenders from liability. Generally, Lenders who take certain actions, including taking title to the property, primarily to protect their security interest and do not participate in the management of a facility or business will not be held responsible under CERCLA.

### WDNR Proposal

With hundreds of Brownfields sites in Wisconsin with potential implications under Wisconsin's Hazardous Waste Management requirements, there have been numerous situations where Lenders and Representatives have expressed concerns about financing loans or taking possession of these properties. Therefore, we are proposing to implement a 48-month pilot program where WDNR could use our enforcement discretion, on a case-by-case basis, for Lenders and Representatives acquiring an interest in property during the pilot period who have not caused the contamination and who meet the criteria set forth in State statutes. Lenders and Representatives meeting the criteria could, upon request, receive a written assurance of Wisconsin's enforcement discretion. In order to be eligible to receive an assurance of enforcement discretion Lenders and

Representatives would need to meet the provisions in s. 292.21, Wis. Stats. (Please see attached statutory language and fact sheet).

This will help in getting Brownfield properties cleaned-up and redeveloped, while at the same time providing an assurance that WDNR will use its enforcement discretion where Lenders and Representatives perform their routine business activities, but are not responsible for pre-existing contamination. Note that WDNR will continue to pursue any viable responsible parties (RP's), and will hold any such parties responsible for cleanup.

The 48-month pilot program would be implemented as follows:

- A Lender or Representative interested in obtaining an assurance of Wisconsin's enforcement discretion, must request that WDNR provide them with written clarification of the applicability of Wisconsin's Hazardous Waste Management requirements and the State Spill Law,
- The Lender or Representative must submit information to WDNR on the property they have or intend to acquire,
- WDNR would evaluate the lender's submittal against the appropriate criteria in state law (see attached statute and fact sheet), to determine if the Lender's relationship with the property and the Lender's actions meet the criteria set forth in the statute. If the Department determines that the criteria set forth under the state's Lender Liability Exemption, s. 292.21, Wis. Stats., are met the Lender or Representative would receive an assurance of Wisconsin's enforcement discretion by WDNR, from ss. 291.25(1) to (5), 291.29, and 291.37, Wis. Stats., and rules promulgated under those provisions provided they make a good faith effort to sell the property.
- Those Lenders or Representatives that receive an assurance of Wisconsin's enforcement discretion as part of the pilot will be assured that the state's use of its enforcement discretion at the property will continue, unless site-specific information is provided to WDNR that changes the Lender's status, or in the event that the property is transferred or sold to a non-Lender or Representative.

During implementation of the pilot, WDNR will track all projects where enforcement discretion is applied to Lenders/Representatives regarding RCRA requirements. The list of cases will be sent to EPA on an annual basis. After 42 months, WDNR will submit a preliminary evaluation of the pilot project, and may submit a request for an extension of the pilot to the Director of the Waste, Pesticides and Toxics Division at Region V. If no request for an extension is made by WDNR, the pilot project will automatically terminate at the end of 48 months.

### Summary

This pilot proposal specifies that during the period of the pilot program, any Lender or Representative meeting the specified criteria can receive an assurance of enforcement discretion from WDNR for property with implications under Wisconsin's Hazardous Waste Management requirements in the following situations: normal lending, acquiring property through foreclosure,

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inspecting property, enforcement of a security interest in personal property and fixtures, and being a representative. Each situation has conditions and requirements that must be met. The Lender or Representative would need to submit a general liability clarification request to WDNR. The Lender or Representative would also need to identify the reason they took or will take title to the property and specifically request a written response from WDNR on the use of its enforcement discretion under Wisconsin's Hazardous Waste Management requirements. This approach would allow the Department to track the number of requests received, as well as to document whether an exemption to liability was granted and the reasons why the particular decision was made.

We look forward to receiving your response to this proposal. If you have any questions, please do not hesitate to contact Mark Gordon at 608-266-7278 or Darsi Foss at 608-267-6713.

Sincerely,

Mark F. Giesfeldt, P.E., Director  
Bureau for Remediation and Redevelopment

Suzanne Bangert, Director  
Bureau of Waste Management

c: Air and Waste Management Team  
Remediation and Redevelopment Management Team  
Waste Management Team  
Deb Johnson – LC/5  
Mark McDermid – CE/8  
Gerry Phillips – EPA Region V  
Karen Peaceman – EPA Region V

Attachs

s. 292.21, Stats.  
ch. 291, Stats.  
Lender Fact Sheet